EXHIBIT 39 2 BUH
DATE 2-6-09
HB 391

McCUE LAW FIRM, P.C.

1085 HELENA AVENUE
POST OFFICE BOX 4416
HELENA, MONTANA 59604

STEPHEN R. McCUE
sr_mccue@yahoo.com
MARY KELLY McCUE
mary.mccue@gmail.com

406/442-2220
FAX 406/449-6038

February 6, 2009

TO: Members, House Business and Labor Committee
FR: Mary McCue, lobbyist, Montana Medical Association

RE: HB 391

The members of the Montana Medical Association oppose HB 391 for the following reasons:

- This bill is broadly drawn and applies to all employment relationships, including those between a physician and the physician's employer. A covenant not to complete in this circumstance should not be permitted because it violates public policy and conflicts with the public good.

- The practice of medicine is different from a common business or trade because physicians deal with patients, not merchandise. Physicians have a duty to make medical care available to the public.

- With regard to the public good, having a greater number of physicians practicing in a community benefits the public by providing greater access to health care. Increased competition for patients tends to improve quality of care and keep costs affordable.

- A person has a right to choose his or her physician and to continue an ongoing professional relationship with that physician. Non-compete agreements in the medical context restrict competition, disrupt continuity of care, and potentially deprive the public of medical services.

- Courts increasingly, emphasizing public policy concerns, have applied closer scrutiny to non-compete agreements involving physicians.

- Three states in recent years have enacted statutes totally prohibiting non-compete clauses in physicians' contracts. In other states, antitrust statutes have been interpreted as prohibiting non-compete clauses among physicians.

- Physicians' relationships with patients are professional and go well beyond simply providing goods or services. The medical profession must have the confidence of

its patients and the relationship involves a fidelity not found in a commercial context. Physicians must have the faith and confidence of their patients to effectively provide services. When a patient has entrusted confidential information to the doctor, this creates a relationship of confidence, and the patient does not wish to have that relationship involuntarily terminated.

- These public policy reasons (the right to freedom of choice in physicians; the right to continue an ongoing relationship with a physician; and the benefits derived from having an increased number of physicians practicing in a given community) outweigh the business interests of an employer.

February 6, 2009

Representative Bill Wilson and Members of the House Business and Labor Committee,

It is with reluctance that I speak against Representative Roberts' HB 391. Representative Roberts has been a legislative friend to physicians and organized medicine on many fronts over many years.

Under current Montana law non-compete contracts and covenants are illegal in all but very narrowly defined circumstances. The right to work and to ply ones chosen trade, vocation, or profession is broadly recognized in Montana law and tradition, and this is rightly so. This has not kept hospitals and in some instances multi-specialty group practices from attempting to circumvent these protections through varied machinations and contrivances. Fortunately, when challenged, our Montana courts have recognized these ploys for what they are, finding such contractual provisions illegal and consequently unenforceable. This may have occurred most recently in Mungas, et al. versus Great Falls Clinic, a suit brought against the Clinic by several former partner physicians.

I cite this most particular instance by way of example as it highlights the important public policy considerations at issue. The Great Falls Clinic requires through retained earnings in capital accounts that partners invest thousands and even tens of thousands of dollars in the Clinic annually. The individual partners pay taxes on these monies as earnings even as they are sequestered in these capital accounts. Over time these capital accounts along with accounts receivable can grow to hundreds of thousands of dollars. Upon retirement it is intended that these accounts are returned to the partner over time. However, if a partner chooses to separate from the Clinic prior to retirement for reasons professional or personal and continues to practice medicine in the county in which they had practiced with the Clinic or a contiguous county, the Clinic seizes two of these four capital accounts along with all accounts receivable. The Clinic calls this seizure of personal assets a forfeiture.

The Clinic seizes these monies whether the former partner continues in private practice, practices in a community health center, practices with the Indian Health Services, practices in a designated federal health manpower shortage area, or with the Veterans Administration. I know with absolute certainty that this is the case because I am a former partner of the Great Falls Clinic. I had practiced with the Clinic for eleven years in Helena. For personal reasons I chose to separate from the clinic in November 2008 taking a position serving our nations veterans at Fort Harrison. Because Fort Harrison is within Lewis and Clark County the Clinic has seized more than $160,000 in my accumulated capital accounts and accounts receivable. The clinic would have done likewise were I to provide services at the Helena Cooperative Health Clinic, the public clinic in Lincoln, Mountain View Medical Center in White Sulfur Springs, Broadwater Health Center in Townsend, or in a practice as distant as Whitefish. All are within Lewis and Clark County or a contiguous county. Allow me to describe this in more concrete terms. The Great Falls Clinic routinely turns away patients who are unable to settle

accounts. Not surprisingly, these same patients often turn to the subsidized Cooperative Health Clinic for care. If a Great Falls Clinic physician chooses to separate from the clinic and provide these discounted services through the Cooperative Health Clinic, then the Great Falls Clinic seizes that physician's capital accounts.

In Mungas et al. versus Great Falls Clinic, the clinic attempted to assert that these contract provisions did not constitute a non-compete clause. Judge Kurt Krueger found that they certainly did constitute a non-compete clause and ruled that as such these provisions were illegal and unenforceable. He has awarded Drs Mungas, et al. the entirety of their capital accounts, accounts receivable, interest and attorneys' fees. I now find it necessary to likewise litigate against the Clinic.

I ask the Committee to carefully consider the public policy implications of sanctioning and allowing here to before illegal non-compete clauses in employer-employee contracts. Hospitals and large clinics will all but certainly use these clauses to quash competition, restrain trade, and limit patient access to physicians and other health care providers. The negative implications for the provision of health care in Montana are evident and substantial.

Dr. Kurt Kubicka
454 W. Lawrence
Helena, MT

Are covenants not to compete becoming unenforceable?

A growing trend explored

BY PETER M. SFIKAS, J.D.

The plaintiff, Murfreesboro Medical Clinic (MMC) is a private medical practice in Murfreesboro, Tenn., employing more than 50 physicians.[1] In early 2000, MMC made an offer of employment to the defendant, Dr. David Udom, to practice internal medicine at the clinic. Dr. Udom accepted the offer orally. Thereafter, MMC provided Dr. Udom with a written employment agreement for his review and signature.

The agreement was for an initial two-year term of employment at MMC and included a noncompete provision that stated, "[u]pon any termination of this Agreement ..., the Employee agrees not to engage in the practice of medicine within a twenty-five (25) mile radius of the public square of Murfreesboro, Tennessee, for a period of eighteen (18) months following such termination."

Dr. Udom reviewed the proposed agreement, signed it and returned it to MMC on or about April 4, 2000. He began work on Sept. 1, 2000, and practiced in the internal medicine department until August 2002.

On Aug. 13, 2002, before his initial two-year term of employment was about to expire, MMC advised Dr. Udom that it would not renew his agreement and set Aug. 31 as his last day of employment. MMC also stated that it would enforce the terms of the covenant not to compete.

Dr. Udom stated in an affidavit that the covenant not to compete would preclude him from practicing medicine at all hospitals in the Murfreesboro area. It also appeared that the covenant would restrict him from practicing in several communities surrounding Murfreesboro, including La Vergne, Antioch, Brentwood, Shelbyville, Woodbury, Lascassas and Lebanon.

> Although most courts continue to enforce physicians' noncompete agreements, more and more courts today are holding these covenants unenforceable for public policy reasons.

On Oct. 10, 2002, Dr. Udom sent a letter to MMC, informing the clinic of his intention to open a medical practice in Smyrna, Tenn.

Shortly after receiving the letter, MMC filed a complaint against Dr. Udom seeking to enjoin him from violating the noncompete provision of his employment agreement. The trial court granted a temporary injunction to MMC, stopping Dr. Udom from practicing medicine in Smyrna, Tenn. In the court of appeals, Dr. Udom argued that the trial court erred in granting MMC the temporary injunction and that the covenant not to compete was unenforceable because it was "unreasonable in the circumstance," did not secure a protectable interest, was overbroad and was against public policy.

The court of appeals reversed the temporary injunction against Dr. Udom but affirmed the trial court ruling that the covenant not to compete was enforceable. The Tennessee Supreme Court allowed an interlocutory appeal because it

found that the issue of whether a covenant not to compete was enforceable against a physician was "a case of first impression" for the court, meaning that it involved issues on which the court had never ruled before.

THE COURT'S ANALYSIS

The court noted that, historically, these covenants are viewed as restraint of trade in any context and, as such, are construed strictly in favor of the employee. However, it also noted that if there is a legitimate business interest to be protected and if the time and territorial limitations are reasonable, then noncompete agreements are enforceable. The court found that the following factors were relevant to determine reasonableness:

- the consideration supporting the covenant;
- the threatened danger to the employer in the absence of the covenant;
- the economic hardship imposed on the employee by the covenant;
- whether the covenant is inimical to the public interest.

In Spiegel v. Thomas, Mann & Smith,[2] a law firm attempted to enforce the terms of a "deferred compensation agreement," which was in essence a noncompete agreement, against an attorney formerly employed by the firm. This court analyzed the validity of the agreement to determine whether the covenant was in conflict with the public interest.

The court first examined the position of the American Bar Association (ABA), which viewed restrictive covenants as unethical. The ABA's ethics committee declared the practice of law different from a common business or trade because lawyers deal with clients, not merchandise, and lawyers have a duty to make legal counsel available to the public. As a result, this court concluded that enforcing the clause in question would violate these ethical standards. Thus, the court found the covenant unenforceable because it was in conflict with the public good.

The court observed that the medical profession also has raised the issue of public good. It found that having a greater number of physicians practicing in a community benefits the public by providing greater access to health care. Increased competition for patients tends to improve quality of care and keep costs affordable. Furthermore, a person has a right to choose his or her physician and to continue an ongoing professional relationship with that physician.

The court noted that if there is a legitimate business interest to be protected and if the time and territorial limitations are reasonable, then noncompete agreements are enforceable.

The court then examined the policies of the American Medical Association (AMA), which has taken the position that physicians' noncompete agreements have a negative effect on health care and are not in the public interest. The AMA has held the view for many years that noncompete agreements restrict competition, disrupt continuity of care and potentially deprive the public of medical services.

The court also found it curious that, despite the AMA's stated position, a majority of courts continue to apply a "reasonableness" standard in evaluating noncompete agreements among physicians, similar to the evaluation of such covenants in commercial contexts. Nevertheless, several states, emphasizing public policy concerns, have applied closer scrutiny to noncompete agreements involving physicians (for an example, see Valley Med. Specialists v. Farber[4]). Also, three states in recent years have enacted statutes totally prohibiting noncompete clauses in physicians' contracts. In other states, antitrust statutes have been interpreted as prohibiting noncompete clauses among physicians.

The court found that both the medical profession and the legal profession were similar with reference to public policy. They both have a duty to make their services available. Their relationships with patients or clients are professional and go well beyond simply providing goods or services. The medical profession, as with the legal profession, must have the confidence of its patients (clients), and the relationship involves a fidelity not found in a commercial context (for an example, see Weber v. Tillman[5]).

These professions must have the faith and confidence of their patients (clients) in order to provide services effectively. When a patient (client) has entrusted confidential information to the doctor (lawyer), this creates a relationship of confidence, and the patient (client) does not wish to have that relationship involuntarily terminated. Patients who entrusted confidential infor-

mation to Dr. Udom, by virtue of their highly fiduciary relationship with him, should not have that relationship involuntarily terminated.

The court concluded its analysis by holding that public policy considerations such as the right to freedom of choice in physicians, the right to continue an ongoing relationship with a physician and the benefits derived from having an increased number of physicians practicing in a given community all outweigh the business interests of an employer. As a consequence, the covenant not to compete was declared void.

Although most courts continue to enforce physicians' noncompete agreements, more and more courts today are holding these covenants unenforceable for public policy reasons. In some instances, this has spread to other health care providers.[6] At present, however, we are not aware of any cases involving dentists whose agreements have been held void because they were judged to be in conflict with public policy. ■

Mr. Sfikas is ADA chief counsel and an adjunct professor of law at Loyola University of Chicago School of Law. He has lectured and written on legal issues and is a fellow of the American College of Trial Lawyers. Address reprint requests to Mr. Sfikas at the ADA, 211 E. Chicago Ave., Chicago, Ill. 60611.

This article is informational only and does not constitute legal advice. Dentists must consult with their private attorneys for such advice.

1. Murfreesboro Medical Clinic, P.A. v. David Udom, Tenn. (Tenn. June 29, 2005).
2. Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W. 2d 528, 529-30 (Tenn. 1991).
3. American Medical Association. Code of medical ethics: Current opinions with annotations, 1998-1999. Chicago: American Medical Association; 1998:Section E 9.02.
4. Valley Med. Specialists v. Farber, 982 P.2d 1277 (Ariz. 1999).
5. Weber v. Tillman, 913 P.2d 84 (Kan. 1996).
6. Sfikas PM. Non-compete agreements: a new trend? ADA Legal Adviser; October 2003. Available to ADA members at: "www.ada.org/members/resources/pubs/adviser/0310/index.asp". Accessed July 29, 2005.